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Regional Freedom of Information Officer
U.S. EPA, Region 9
75 Hawthorne Street (OPA-2)
San Francisco, CA 94105
(415) 947-4251
r9foia@epa.gov

VIA EMAIL AND U.S. MAIL

Re: **Freedom of Information Act Request for Documents Concerning Triennial Review
of Water Quality Control Plans for the San Francisco Bay/Sacramento-San Joaquin
Delta Estuary**

Dear Freedom of Information Officer,

This is a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, on behalf of the Institute for Fisheries Resources ("IFR"). We are requesting (1) documents (as specifically described below) that relate to the United States Environmental Protection Agency's ("EPA's") triennial reviews under section 303 of the Clean Water Act of Water Quality Control Plans for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("Bay-Delta") and (2) waiver of your costs of producing these documents, as detailed below.

BACKGROUND

IFR seeks production of documents pertaining to (1) EPA's triennial review of the State of California's Water Quality Control Plans for the Bay-Delta, and (2) EPA's review of the California WaterFix (also known as the Delta Tunnels), a proposal to divert freshwater from the Sacramento River upstream of the Sacramento River Delta. Freshwater flows are an essential component of the Bay-Delta ecosystem.

The Clean Water Act (CWA) was enacted by Congress in 1972 in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Water quality standards are created and reviewed by the states at least every three years in a process known as "triennial review." 33 U.S.C. § 1313(c)(1); *Pronsolino v. Nastri*, 291 F.3d 1123, 1127 (9th Cir. 2002). Water quality standards designate specific uses for the subject waters, taking into account the water's "use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and

agricultural, industrial, and other purposes,” and then establish numeric and narrative water quality criteria to protect those uses. 33 U.S.C. § 1313(c)(2); 40 C.F.R. § 131.2. All new and revised standards must be submitted by the states to EPA for review. EPA must notify the state within 90 days if the standard is rejected. If the state fails to act within 90 days, EPA shall “promptly prepare and publish proposed” water quality standards for the state. 33 U.S.C. § 1313(c)(4)(A); *Idaho Conservation League v. Browner*, 968 F.Supp. 546, 548 (W.D.Wash. 1997); *Northwest Environmental Advocates v. U.S. E.P.A.*, 268 F.Supp.2d 1255 (D.Or. 2003).

DOCUMENTS SOUGHT

IFR requests the following documents:

1. Any documents dated after January 1, 1990 related to Bay-Delta water quality standards submitted by the State of California to EPA as part of the above described triennial review process.
2. Any documents dated after January 1, 1990 prepared by EPA relating to its adoption, proposed withdrawal, or continuing evaluation of water quality standards for the Bay-Delta, including any documents related to EPA’s mandated triennial review.
3. Any documents dated after January 1, 1990 related to EPA’s evaluation of proposals to move the existing point of diversion of water from the Bay-Delta for either the State Water Project or the Central Valley Project.

“Documents” as used in this request include all written or electronic correspondence, notes, memoranda, reports, data, studies, computer models or outputs, measurements of water flow or quality and fish or wildlife health or abundance or other writings in EPA’s possession which fall within the above three categories.

REQUEST FOR FEE WAIVER

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107, we request a fee waiver for all costs related to locating, tendering, copying and mailing the documents produced in response to our request on two grounds. First, disclosure of these documents is in the public interest and not primarily in the commercial interest of the requester. FOIA requires that documents “be furnished without any charge or at a charge reduced below the fees established . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government,” and “is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii) (quote); 40 C.F.R. § 2.107(l); *see, e.g., Center for Biological Diversity v. Office of Management & Budget*, 546 F.Supp.2d 722, 726-727 (N.D. Cal. 2008). Under *Friends of the Coast Fork v. U.S. Dep’t of the Interior*, 110 F. 3d 53, 55 (9th Cir. 1997), fee waiver requesters must state

“why they wanted the [document], what they intended to do with it, to whom they planned on distributing it, and the . . . expertise of their membership.” IFR meets each of these fee waiver requirements.

The requested documents concern the operations and activities of the federal government with regard to its statutorily mandated duty to conduct triennial reviews under the Clean Water Act. 40 C.F.R. § 2.107(l)(2)(i). Disclosure of the above requested documents is likely to make a significant contribution “to an understanding of the subject by the public” because IFR – an organization possessing expertise and promoting research in the field of water quality and fisheries impacts – will review those documents and share them among its members and the public at large. 40 C.F.R. § 2.107(l)(2)(ii)-(vi); *Cause of Action v. F.T.C.*, 799 F.3d 1108, 1125-26 (D.C. Cir. 2015) (public advocacy organization distribution through newsletter and press releases qualifies for fee waiver).

IFR seeks the requested documents for use in furthering the organization’s mission. IFR would utilize its online newsletter¹ and other outlets, such as press releases, to disseminate the information released under this request to educate the public and the government regarding the Bay-Delta’s water quality and the condition of its fisheries resources. Thus, this request is made in furtherance of the public interest for noncommercial purposes.

Second, IFR is entitled to a waiver of your costs of production under 5 U.S.C. § 552(a)(4)(A)(ii)(II) because IFR is a “noncommercial scientific institution.” IFR is a nonprofit corporation which the Internal Revenue Service has deemed to be tax exempt under Internal Revenue Code section 501(c)(3). IFR’s mission is to advocate and secure the protection and stewardship of the fisheries of the west coast of the United States in order to restore and preserve their ecological health for the people, fish, and wildlife that depend on western water systems.

IFR’s mission focuses on fisheries research and conservation. IFR is dedicated to promoting sustainable fisheries management, which includes the protection and restoration of fish resources and the human economies that depend on them. By establishing alliances among fishing men and women, government agencies, and concerned citizens, IFR unites resource stakeholders, protects fish populations, and restores aquatic habitats. IFR carries out fishery research and conservation activities, with a particular historical focus on dams, water diversion, and forestry concerns. More recently, IFR has expanded its range of programs to encompass conservation projects and constructive dialogues about fisheries resource management policy at the regional, national, and international levels. IFR’s goal is a global, sustainable fishery.

IFR seeks to protect the Nation’s fisheries and does not represent the interest of any individual commercial fishermen. An organization that works to advance the public good while representing workers who also have a commercial interest does not have a primarily commercial interest. *Public Employees for Environmental Responsibility v. US Dep’t of Commerce*, 968 F.Supp.2d 88 (D.D.C. 2013) (*PEER*). In *PEER*, the court considered a waiver request by a nonprofit organization requesting

¹ IFR’s online newsletter is available at <http://www.ifrfish.org/news/>.

information related to National Marine Fisheries Service (NMFS) observers. The court concluded that the “nonprofit, nonpartisan public interest organization concerned with upholding the public trust through responsible management of our nation’s resources” represented its members’ environmental concerns, rather than their interests as employees of the government.² *Id.* at 99.

So too here, IFR seeks the requested information to advance the environmental concerns of its members and the public at large, rather than its members’ commercial interests. It is settled law that an organization’s interest is not primarily commercial merely because some members of the organization may have private claims that the requested information might advance. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1283-1284 (9th Cir. 1987) (no commercial interest, though disclosure not shown to be in public interest).

SUMMARY

We request that you provide us with true and complete copies of the requested documents, and that you waive all costs of doing so. In the event you decline to waive costs, and without waiving our right to challenge that decision by administrative appeal or judicial review, we agree to pay all reasonable search and associated administrative and copying costs. However, if these costs exceed \$25.00, we request that you notify us before proceeding. Furthermore, please ensure that the first two (2) hours of administrative search time and the first one-hundred (100) pages of documents produced are provided free of charge, pursuant to the OMB FOIA Schedule and Guidelines at § 8(d).

Your prompt response to this request is appreciated. Thank you for your courtesy and cooperation. Do not hesitate to contact me if you have any questions regarding this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephan C. Volker", written over the word "Sincerely,".

Stephan C. Volker

Attorney for the Institute for Fisheries Resources

SCV:taf

² Though the *PEER* court found in favor of the nonprofit as a non-commercial entity, it concluded that the requested documents would not make any contribution to the public interest because they only concerned interactions with one individual contractor. *PEER*, 968 F.Supp.2d at 99.